

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CHRISTOPHER PEMENTAL

Plaintiff,

V.

C.A. No.: 1:18-cv-00101

US BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR THE HOLDERS OF
THE BEAR STEARNS ASSET BACKED
SECURITIES I TRUST 2004-AC6, ASSET
BACKED CERTIFICATES, SERIES 2004-AC6,
AND OCWEN LOAN SERVICING, LLC,
Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants, U.S. Bank National Association as Trustee for the Holders of the Bear Stearns Asset Backed Securities I Trust 2004-AC6, Asset-Backed Certificates, Series 2004-AC6 (“U.S. Bank as Trustee”) and Ocwen Loan Servicing, LLC (“Ocwen”) (collectively the “Defendants”) submits this memorandum of law in support of its *Motion to Dismiss* the plaintiff’s complaint pursuant to *Fed. R. Civ. P.* 12(b)(5) for insufficiency of service of process. Plaintiff, Christopher Pemental (“Mr. Pemental”) failed to serve the summons and complaint on the Defendant within the time established by *Fed. R. Civ. P.* 4(m).

STANDARD OF LAW

Dismissal pursuant to *Fed. R. Civ. P.* 12(b)(5) for insufficient service of process is appropriate when service was not perfected as required under state law prior to removal. *Osborne v. Sandoz Nutrition Corp.*, 67 F.3d 289, 1995 WL 597215, * 1-2 (1st Cir. 1995) (per curiam); *Feliz v. MacNeill*, 493 Fed. Appx. 128, 131 (1st Cir. 2012). Before a federal court can exercise personal jurisdiction over a defendant, proper service of process must be effected. *Omni Capital Int’l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S.Ct. 404 (1987). When the

sufficiency of process is challenged under Rule 12(b)(5), the burden is on the plaintiff to prove proper service. *See Vazquez-Robles v. CommoLoCo, Inc.*, 757 F.3d 1, 4 (1st Cir. 2014).

ARGUMENT

Defendants move to dismiss under *Fed. R. Civ. P.* 12(b)(5) for insufficiency of service of process because Mr. Pemental has not served the summons and complaint on the Defendants within the time permitted by *Fed. R. Civ. P.* 4(m). That rule provides in relevant part, “If a defendant is not served within 90 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time.” The failure to properly serve a defendant within the time period of *Fed. R. Civ. P.* 4(m) is grounds for dismissing the complaint. *See Batavitchene v. Taupa Lithuanian Fed. Credit Union*, NO. 17-10073-GAO, U.S. Dist. LEXIS 122124 at *2-4 (D. Mass. August 3, 2017).

Mr. Pemental filed this action on March 1, 2018. More than 90 days have elapsed and Mr. Pemental has not yet served this action on the Defendants. Mr. Pemental has not shown any efforts to effectuate service, nor has he requested an extension of time from this Court. Because Mr. Pemental has not complied with Rule 4(m), the Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants’ motion to dismiss should be granted for insufficient service of process.

Respectfully submitted,

US BANK NATIONAL ASSOCIATION AS
TRUSTEE FOR THE HOLDERS OF
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BACKED CERTIFICATES, SERIES 2004-AC6,
AND OCWEN LOAN SERVICING, LLC

By their Attorneys,

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Date: June 18, 2018

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 18th day of June, 2018, this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be mailed to those indicated as non-registered participants.

/s/ Krystle G. Tadesse
Krystle G. Tadesse